In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1253

BERNARD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is reported at 284 F. Supp. 419.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. The petition for a writ of certiorari was filed on April 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against self-incrimination is a defense to a charge of possession of an unregistered distillery.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing an unregistered distillery, in violation of 26 U.S.C. 5601(a)(1). On April 5, 1968, he was sentenced to imprisonment for three years. The court of appeals affirmed per curiam (Pet. App. A).

The evidence against petitioner at trial consisted of the testimony of five Alcohol and Tobacco Tax Division agents who on November 11-12, 1967, had conducted a surveillance of an illicit distillery located in a woods near Borum, Alabama. Petitioner, co-defendant Hendrix Richardson,[1] and an unidentified third man were observed operating the distillery and producing 80 gallons of moonshine whiskey.

Prior to trial petitioner moved to dismiss the indictment, alleging that compliance with the registration requirements of the federal liquor laws would have compelled him to incriminate himself. The motion was denied. In an opinion filed after the trial, the district court found that the registration requirements of the liquor laws serve a legitimate regulatory purpose in protecting a major source of federal revenue, and are not directed at persons inherently sus-

[1] Richardson was also convicted but did not appeal.

pect of criminal activities. The Court concluded, therefore, that the principles expressed in the *Marchetti*, *Grosso*, and *Haynes* decisions[2] did not control this case (Pet. App. B 1-7).

ARGUMENT

Petitioner was indicted and convicted under 26 U.S.C. 5601(a)(1) (Pet. 3), which prohibits possession by "any person" of a still which is not registered under 26 U.S.C. 5179(a). Assuming *arguendo* that petitioner correctly argues (Pet. 6) that under *Haynes* the registration requirements of Section 5179 (a) are relevant to his conviction, his contentions must still fail. As the district court fully explained in overruling petitioner's self-incrimination claim as unfounded in this record, there are compelling differences between the liquor laws and the wagering tax and firearms statutes, which render the principles announced in *Marchetti*, *Grosso*, and *Haynes* inapplicable to a prosecution for failing to register a distillery (assuming, we reiterate, that this was in effect the substance of petitioner's offense).

This Court long ago recognized that taxation of the liquor industry was lawful and that the sole purpose of the comprehensive liquor tax statutes was to assure the collectability of the taxes. *United States* v. *Ulrici*, 111 U.S. 38, 40. Taxation of liquor began in 1791 (1 Stat. 203); the present laws have changed little since 1868 (15 Stat. 125). Prior to the adoption of

---

[2] *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; *Haynes* v. *United States*, 390 U.S. 85.

the Sixteenth Amendment, taxes derived from distilled spirits provided one of the principal sources of federal revenue. Today, though far outstripped by the income tax, the revenue from the distilled spirits tax still contributes a substantial amount to the federal treasury —more than four billion dollars annually.

The Court in *Marchetti*, *Grosso*, and *Haynes* carefully pointed out that the wagering and firearms tax statutes were so structured that their impositions fell primarily, if not exclusively, on persons whose involvement in the taxed activity was illegal under other federal or state laws. By contrast, dealing in distilled spirits is lawful to some extent in every state. See *Brown* v. *United States*, 401 F. 2d 769 (C.A. 5). These taxing statutes therefore were not inserted into an area permeated with criminal statutes [except, of course, those directed to protection and collection of revenue]. Individuals involved in this industry cannot be termed a "highly selective group inherently suspect of criminal activities," but rather are persons whose activities appropriately give rise to an "essentially non-criminal and regulatory area of inquiry". See *Haynes* v. *United States*, 390 U.S. 85, 98-99; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. The laws relating to distilled spirits have never been deemed to serve as a disguise for obtaining incriminating disclosures. The information required to be divulged by a distillery operator is limited to the collection of data necessary for efficient administration of a major revenue program. Unlike the situation in the gambling and firearms tax areas, registrants who comply with the liquor tax requirements

have no basis for fearing that their disclosures will confront them with "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination". *Marchetti, supra*, 390 U.S. at 53. As the district court observed (Pet. App. B 4), there is no congressional policy against the manufacture of whiskey and no evidence of any intent to use federal tax information to facilitate enforcement of any local liquor laws.

Petitioner urges, however, that in *his* case, registration would have been incriminating because the state of Alabama generally prohibits the manufacture of liquor. This Court has not suggested, however, that the validity and enforceability of a broadly based and uniformly applied federal statute designed for a legitimate purpose can be set at naught by the variety of state law. Furthermore, we know of no instances where evidence of the registration required by 26 U.S.C. 5179 has been utilized in the prosecution of state cases for violation of their local liquor laws. Petitioner himself has not been indicted by the state of Alabama, and there is no reason to speculate that he will be. Thus, even when we focus on petitioner's precise situation, local prohibition of his conduct cannot be said to have made the self-incrimination hazards of fulfilling his federal obligations "real and appreciable" rather than "imaginary and unsubstantial." *Marchetti, supra*, 390 U.S. at 48.[3]

---

[3] But even if a state or locality should endeavor to prosecute a person on the basis of information obtained from his federal registration, the appropriate remedy would be, as the district court commented (Pet. App. B 4-5), to impose restric-

CONCLUSION

The petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

MAY 1969.

---

tions on the use of such disclosures for a criminal proceeding. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78-79. There is no occasion now to anticipate that improbable event.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 349893 678